IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5870 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BAKUL HARIPRASAD PANCHOLI THROWIFE DEVIBEN B PANCHOLLI

Versus

STATE OF GUJARAT

Appearance:

MS KRISHNA U MISHRA for Petitioner

MR UDAY BHATT Ld. AGP for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.H.MEHTA

Date of decision: 03/10/2000

ORAL JUDGEMENT

The petitioner has, by filing this writ petition under Article 226 of the Constitution of India, challenged the legality and validity of an order of detention dated 21.3.2000, page 12, passed by the respondent no. 2 in respect to detenu Bakul Hariprasad Pancholi, in exercise of his powers conferred on him under Sec. 3(2) of the Gujarat Prevention of Antisocial Activities Act, 1985 (in short 'the Act').

2. As per the papers of grounds of detention, the detenu is a "bootlegger" within the meaning of section 2(b) of the Act, and further that activities of the detenu are prejudicial to the maintenance of the public order.

3. To arrive at a subjective satisfaction, the detaining authority has placed reliance on one case punishable under the provisions of Bombay Prohibition Act referred to in the grounds of detention and that one case is pending before the Court for trial. The detaining authority i.e. the authority who passed an order of detention also placed reliance on statements of two witnesses whose identity has not been disclosed by claiming privilege under sec. 9(2) of the Act. That two statements were verified by the detaining authority on 21.3.2000 and on the same day he passed an order of detention which is challenged in this petition.

4. Though rule has been served upon each respondent, none of the respondents has filed affidavit-in-reply, in reply to this writ petition. Thus, it is clear that the respondents have not controverted the grounds of attack for challenging an order of detention which is the subject matter of this writ petition.

5. Learned advocate for the petitioner has argued that statements of two witnesses were verified on 21.3.2000 and on the same day the detaining authority passed an order of detention and, therefore, it can be said that he has not applied his mind before passing the order of detention. Learned advocate for the petitioner has cited an authority of Kalidas Chandubhai Kahar vs. State of Gujarat and Ors., reported in 1993 (2) GLR 1659, wherein it has been held that the detaining authority is expected to do some exercise before actually exercising the privilege under sec. 9(2) of the Act. It has been further held that at the time of exercising the privilege under sec. 9(2) of the Act, balance is required to be struck between the public interest on the one hand and the right of the detenu to make a representation under Article 22(5) of the Constitution on the other. If the statements of the witnesses are to be relied on, they must be genuine statements of the real persons. The detenu would like to verify as to whether these persons are fictitious persons or not and/or whether their statements are bogus statements or not ? Unless the detenu knows the names and addresses of the persons who have given the statements, he cannot verify the aforesaid facts and if the names and addresses along with the contents of the statements are supplied to the detenu, he can have full opportunity to verify the position and make an effective representation on that basis. As against this, there is a provision under sec. 9(2) carved out on the basis of Article 22(5) of the Constitution which

provides that nothing in sub-sec. 1 shall require the authority making such order to disclose facts which it considers to be against the public interest to disclose. Therefore, it is the duty of the detaining authority to strike a balance as stated above, that in the public interest, the names and addresses of the witnesses could not be disclosed. This should not be treated as an idle formality as it affects the public interest on the one hand and the right of the detenu on the other. It was held that looking to the respective date of verification of statements and date of order of detention as stated in that case the detaining authority had no sufficient time to examine the possibility of exercising the privilege under Sec. 9(2) of the Act and this Court held that looking to that facts it is a wrong exercise of powers under Sec.9(2) of the Act which has affected the right of making effective representation under Article 22(5) of the Constitution of India and, therefore, the continued detention of the detenu is bad and illegal. Keeping in mind the aforesaid legal position with regard to privilege under Sec. 9(2) of the Act, here in this case also, looking to dates of statements of witnesses and date of verification made by the detaining authority and date of order of detention, it can certainly be said that the detaining authority had no time to verify the statements in its correct perspective as expected by this Court in aforesaid case and, therefore, in this case also the order of detention passed by the detaining authority is in wrong exercise of power under Sec.9(2) of the Act, and therefore, it is bad in law and same is required to be quashed and set aside.

6. In view of what is stated hereinabove, this writ petition is allowed. The impugned order of detention dated 21.3.2000 passed by the respondent no. 2 in respect to detenu is set aside. The detenu is ordered to be released forthwith, if he is not wanted in any custody further for any criminal case or proceedings. Rule is made absolute. Direct service is permitted.

(H.H. MEHTA, J.)

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